

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DAVON SMITH,

Plaintiff,

22cv1261

ELECTRONICALLY FILED

v.

E. STREIT *CORRECTIONAL OFFICER*,
MARK CAPOZZA *SUPERINTENDENT*,
C. DISALVO *LIEUTENANT*,

Defendants.

Order Granting Motion to Dismiss.([Doc. 19](#)) and Adopting Report and Recommendation with
Modification ([Doc. 28](#))

This is a *pro se* prisoner civil rights case, brought pursuant to 28 U.S.C. Section 1983. Currently pending before this Court is Defendants' Motion to Dismiss for failure to state a claim upon which relief may be granted. ([Doc. 19](#)). On February 17, 2023, Defendants filed the instant Motion, and upon Plaintiff's repeated Motions, his response due date was extended until June 5, 2023. As of this date, no response has been filed by Plaintiff.

On August 3, 2023, United States Magistrate Judge Lisa Pupo Lenihan filed a Report and Recommendation ([Doc. 28](#)) and recommended that the Defendants' Motion to Dismiss ([Doc. 19](#)) be granted in part and denied in part. Specifically, it recommended that the Motion be: (1) granted with prejudice as to Plaintiff's Eighth, Fifth, and Fourteenth Amendment claims, and as to all claims against Defendants in their official capacities; (2) granted with prejudice as to the individual capacity claims against Defendants Capozza and Disalvo, who should be terminated as party defendants; (3) granted without prejudice to Plaintiff's filing an amended complaint as to the First Amendment access to the courts claim against Defendant Streit; (4) denied as to

Plaintiff's state law claims (at the time of the Report and Recommendation). It was further recommended that Plaintiff be provided an opportunity to file an amended complaint as to the First Amendment access to the courts claim by a date certain set by the District Judge, and that in the absence of any such amendment, all federal claims be dismissed with prejudice, and that the District Court refuse to exercise supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(c).

The parties had 14 days from the date of service of the August 3, 2023, Report and Recommendation to file any objections thereon. As of this date, over a month later, none have been filed.

Upon careful consideration and *de novo* review, the Court hereby adopts the Report and Recommendation of the United States Magistrate Judge ([Doc. 28](#)), with one modification regarding dismissal of the state law claims, as the Opinion of the Court and Orders as follows:

Defendants' Motion to Dismiss is: GRANTED with prejudice as to Plaintiff's Eighth, Fifth, and Fourteenth Amendment claims, and as to all claims against Defendants in their official capacities; GRANTED with prejudice as to the individual capacity claims against Defendants Capozza and Disalvo, who are terminated as party defendants. Defendants' Motion to Dismiss is GRANTED without prejudice to Plaintiff's filing an amended complaint as to the First Amendment access to the courts claim against Defendant Streit on or before September 25, 2023.

Because the Court is presently without federal jurisdiction to entertain this case, the Court will decline the exercise supplemental jurisdiction over the state law claims at this time, pursuant to 28 U.S.C. § 1367(c), and dismisses the state law claims as well, without prejudice.

SO ORDERED this 5th day of September, 2023.

s/Arthur J. Schwab
Arthur J. Schwab
United States District Judge

cc: All counsel of record

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